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Delaware Fiduciary Duty Law After *QVC* And *Technicolor*: A Unified Standard (and the End of *Revlon* Duties?)

By Lawrence A. Cunningham and Charles M. Yablon***

On December 9, 1993, attorneys for Paramount, QVC, Viacom and others, plus scores of arbitragers, reporters and curious citizens, gathered in Wilmington, Delaware for oral argument before the Delaware Supreme Court in the battle for control of Paramount.[1] The case was the most dramatic in recent Delaware history, involving a glamorous industry, bitter rivalry among colorful protagonists, a hard-fought big-money takeover contest and, not incidentally, unsettled issues of Delaware law.

During two hours of oral argument, broadcast nationally on Court TV, viewers saw and heard a highly technical discussion about the intricacies of Delaware fiduciary duty law. Much of the discussion focused on the vexing question of when management of a Delaware company must facilitate the company's sale to a bidder offering the highest immediate value, a duty first imposed in the Delaware Supreme Court's landmark opinion, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[2]

During the oral argument, Viacom's attorney denied that the Paramount board's actions favoring Viacom's proposal over QVC's violated Delaware law, and contended that his argument would be valid "whether or not we were in *Revlon*-land."[3] This common phrase of the mergers and acquisitions bar provoked a perceptible grimace from Justice Andrew Moore, author of the *Revlon* decision, who admonished counsel by stating "the Court doesn't use those kinds of terms."[4]

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1. Ordinarily the Delaware Supreme Court sits in Dover. Due to the extraordinary public interest in this case, however, the court shifted venue to Wilmington, where a larger courtroom was available.

2. 506 A.2d 173 (Del. 1986).

3. Videotape of Oral Argument, December 9, 1993 (on file at the Cardozo Law School Library).

4. *Id.*

Justice Moore's comment was most likely just a reminder that such colloquialisms are inappropriate in formal argument before Delaware's highest court. In light of the court's recent decisions in *Paramount Communications, Inc. v. QVC Network, Inc.*[5] and *Cede & Co. v. Technicolor, Inc.*,[6] however, Justice Moore also could have been expressing a fundamental doctrinal shift in Delaware fiduciary law. *Technicolor* and *QVC* seem to reject the assumption, widely held by corporate practitioners, that directors' fiduciary duties in takeover situations may be analyzed in terms of separate duties set forth by the Delaware Supreme Court in *Revlon*, *Unocal* and *MacMillan*,[7] and that directors' fiduciary obligations under the duty of care are distinct from their obligations under the duty of loyalty.

Instead, both *Technicolor* and *QVC* view Delaware fiduciary law as imposing on all corporate directors a single, highly general obligation of good faith and fair dealing based on reasonably informed judgment.[8] *Technicolor* states that any breach of this obligation, whether characterized as a breach of the duty of loyalty or the duty of care, yields the same strict "intrinsic fairness" standard of review.[9] *QVC* analyzes the question of whether directors breached their fiduciary duties in takeover situations in terms of an intermediate "enhanced scrutiny" standard of review.[10] This single standard is potentially applicable to a broad range of managerial decisions regarding control and other extraordinary corporate events.

The enhanced scrutiny standard never specifies any particular course of action management must take in responding to a takeover bid or any other extraordinary corporate event. Accordingly, *QVC* expressly denies that Delaware law ever imposes a "*Revlon* duty," in the narrow sense of an obligation to sell the company for the highest immediate value.[11] Rather, management's duty is to exercise informed judgment to obtain "the best value reasonably available to the stockholders."[12]

This Article seeks to analyze and understand *QVC* and *Technicolor* as part of a movement in Delaware fiduciary law toward a single, more unified standard, and away from doctrinal fragmentation. We recognize, however, that these cases can be analyzed from other perspectives. For instance, they can be viewed as simply disapproving sleazy actions by corporate

5. 637 A.2d 34 (Del. 1994).

6. 634 A.2d 345 (Del. 1993).

7. *See* Unocol Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261 (Del. 1989).

8. See *infra* text accompanying notes 24-52 and 63-73.

9. *See infra* text accompanying notes 24-52.

10. *See infra* text accompanying notes 63-73.

11. *See QVC*, 637 A.2d at 47.

12. *Id.* at 43-51.

management, an application of the perennial Delaware "smell" test;[13] or as a repudiation of the relatively lenient standard applied to defensive tactics in *Time-Warner*[14] and the harbinger of a new "get tough" attitude toward incumbent boards; or as only the latest swing of the pendulum in Delaware law, whereby the court, having moved in a pro-management direction in *Time-Warner*, was now primed to move back toward a more shareholder-friendly standard.[15]

All these perspectives are consistent with the facts and holdings in *QVC* and *Technicolor*. None, therefore, can be proven wrong. Yet we believe the most interesting aspect of these opinions, and what unites them, is the desire to reduce doctrinal fragmentation in Delaware fiduciary law. These cases express management's fiduciary obligations in terms of legal principles that are broader, more general and more vague than those of the prior case law and commentary, thereby presenting Delaware law as more unified and coherent.

An important implication of this new unified standard is that the so-called "*Revlon* duty"—an affirmative legal obligation to conduct a fair auction for the company and to sell it to the highest bidder—no longer exists under Delaware law.[16] This may seem like a strange conclusion to reach about a case which effectively forced incumbent management to adopt just such a bidding procedure.[17] Nonetheless, *QVC* expressly denies that Delaware law ever requires management to conduct an auction, or to solely consider immediate value, or to reject a valuable strategic alliance.[18] Rather, it views the *Revlon* auction as simply one way management might choose to carry out its more general fiduciary duty to obtain "the

13. *See* Dennis J. Block, Nancy E. Barton & Stephen A. Radin, *The Business Judgment Rule*, TWENTIETH ANNUAL INSTITUTE ON SECURITIES REGULATION 173, 180-81 (C. Nathan et al. eds. 1989); Douglas M. Branson, *The Chancellor's Foot in Delaware: Schnell and Its Progeny*, 14 J. CORP. L. 515 (1989). *But see* Nixon v. Blackwell, 626 A.2d 1366, 1378 (Del. 1993) (announcing that judicial decisions reviewing interested corporate transactions "should not be the product solely of subjective reflexive impressions based primarily on suspicion or what has sometimes been called the 'smell test'." (citations omitted)).

14. Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1990). This opinion has come to be called *Time-Warner*, referring to the transaction between Time, Inc. and Warner Communications, Inc. at issue in the case.

15. *See* Charles M. Yablon, *Poison Pills and Litigation Uncertainty*, 1989 DUKE L.J. 54, 72-81. *See also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992) (as a conception of the business corporation, the "*Time-Warner* decision, should itself be seen as provisional, not final").

16. *See QVC*, 637 A.2d at 43-51.

17. After the Delaware Supreme Court found that Paramount's board breached its fiduciary duties, the board established bidding procedures for a live auction of the company. Following a series of bids from each of QVC and Viacom, the auction ended on February 15, 1994, with Viacom victorious. *See* Geraldine Fabrikant, *Viacom is Winner Over QVC in Fight to Get Paramount*, N.Y. TIMES, Feb. 16, 1994, at A1.

18. *QVC*, 637 A.2d at 43-51.

best value reasonably available to stockholders."[19] *QVC* is very clear that management has this general obligation whenever engaged in a sale of control.[20]

The logic of *QVC* also may lead future Delaware courts to conclude that this same general obligation, subject to enhanced scrutiny, exists when management resists a change in control. Ironically, *QVC* could therefore represent both the end of *Revlon* duties and of the judicial search for the appropriate dividing line between imposing stringent *Revlon* duties and the far weaker version of *Unocal* duties applied in *Time-Warner*. The *QVC* standard would require enhanced scrutiny of management actions in take-over situations, and perhaps of other extraordinary transactions as well. More flexible than *Revlon*, but more stringent than *Time-Warner*, adoption of this unified standard would moot the inconclusive debate about what triggers *Revlon*.

This Article will analyze *Technicolor* and *QVC*, with particular attention to the way both seek to unify fiduciary standards under Delaware law. In addition, this Article will consider Delaware law leading up to *Technicolor* and *QVC*, tracing both the growing fragmentation of Delaware law in the 1980s and the growing judicial concern about that fragmentation. This Article will argue that the concern over fragmentation and the desire for a unified standard were not the result of external pressures or policy concerns, but of internal judicial concerns about potential inequity, manipulability and lack of coherence in Delaware law. Finally, this Article will look at the practical significance of these new cases and the seeming trend toward a more unified conception of fiduciary law.

THE UNIFIED STANDARD UNDER TECHNICOLOR *AND* QVC

Technicolor is clear in its novel holding that violations of the duty of care imply substantially the same consequences as violations of the duty of loyalty.[21] *QVC* also represents a dramatic change in doctrinal law, although the implications of that change are more complex and uncertain.[22] These cases mark the first concrete articulations of a broader unification of Delaware fiduciary law. Under this unified standard, not only are breaches of the duties of care and loyalty treated similarly, but sales of control, defensive tactics, and other extraordinary management decisions having a significant practical impact on stockholder interests are all potentially united under a single intermediate standard of enhanced scrutiny.[23]

19. *Id.*

20. *Id.*

21. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367-68 (Del. 1993).

22. *See infra* text accompanying notes 159-180.

23. In a separate Appendix, we depict graphically the analytical framework governing Delaware fiduciary duty law as it came to exist by the late 1980s and contrast it with the structure of the unified standard as it seems to exist following *Technicolor* and *QVC*.

TECHNICOLOR *AND UNIFICATION OF DUTIES OF CARE AND LOYALTY*

Before 1985, casebooks and commentators divided fiduciary duties into the two broad categories of duty of care and duty of loyalty, but everyone knew that only the duty of loyalty mattered. Professor Bishop announced in the late 1960s that courts almost never held directors liable for breach of the duty of care,[24] and it was generally believed that the application of gross negligence standards to such cases, coupled with the business judgment rule, insulated all but the most senile or inebriant directors from any real danger of duty of care liability.[25]

These comfortable assumptions disappeared with the Delaware Supreme Court's decision in *Smith v. Van Gorkom*,[26] which imposed duty of care liability in response to a common corporate problem, sometimes referred to as "structural bias." It is the tendancy of outside directors to acquiesce in the plans and desires of the incumbent CEO, often a personal friend who put them on the board in the first place.[27] In *Van Gorkom*, the outside directors had rubber stamped a merger proposal negotiated by, and greatly benefiting, the current CEO, giving the merger terms only cursory review before approval. The court found such supine compliance to breach the duty of care.[28]

Van Gorkom sent shock waves through the corporate world, raising the specter of directors subject to multi-million dollar personal liability for failure to study mind-numbing merger documents with sufficient care.[29]

24. Joseph W. Bishop, *Sitting Ducks & Decoy Ducks: New Trends in the Indemnification of Corporate Directors & Officers*, 77 YALE L.J. 1078, 1099 (1968) ("The search for cases in which directors of industrial corporations have been held liable in derivative suits for negligence uncomplicated by self-dealing is a search for a very small number of needles in a very large haystack.").

25. *E.g.*, Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981).

26. 488 A.2d 858 (Del. 1985).

27. *See* Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 611-13, 622 (1982) (noting the limitations on outside directors created by structural bias, inadequate resources and the lack of economic incentives to monitor, as well as by psychological and social considerations which cause independent directors to identify with and defer to the decisions of management); James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83 (1985) (providing empirical evidence of these psychological phenomena).

28. *Van Gorkam*, 488 A.2d at 874-880.

29. *See, e.g.*, Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After Van Gorkom*, 41 BUS. LAW. 1 (1985) ("The Delaware Supreme Court in *Van Gorkom* exploded a bomb. Stated minimally, the court there pierced the business judgment rule and imposed individual liability on independent (even eminent) outside directors of Trans Union Corporation because (roughly) the court thought they had not been careful enough, and had not enquired enough. . . . The corporate bar generally views the decision as atrocious. Commentators predict dire consequences as directors come to realize how exposed they have become.").

A solution of sorts was reached, however, by passage of a new provision of Delaware law enabling companies to opt out of duty of care liability for their directors[30] and through a change in the way board meetings were generally conducted. Corporate practitioners assumed that, as long as comprehensive descriptions of the transactions were sent to directors early enough to be studied before the meeting, and the discussions at the meetings lasted long enough, the Delaware courts would conclude that the board action had been reasonably informed.[31] Yet the scope of *Van Gorkom* duties remained unclear, and existed uneasily beside other fiduciary duties imposed on directors in merger situations.

In *Cede & Co. v. Technicolor, Inc.*,[32] the Delaware courts again faced the problem of structural bias. The facts were almost a replay of *Van Gorkom*. An acquiescent board approved a merger negotiated by the CEO that would personally benefit him and another director. The board meeting in *Technicolor* was a pre-*Van Gorkom* meeting, both chronologically[33] and procedurally. Most of the directors knew little or nothing about the proposed merger before the meeting and it was unclear whether there were any documents available for review.

In an unpublished opinion,[34] Chancellor Allen analyzed the issues of structural bias under both the duty of loyalty and the duty of care. With respect to the duty of loyalty, he confronted the problem generally present in structural bias cases. Only two board members had derived personal pecuniary benefits from the merger, and each had disclosed their interests to the board. Accordingly, it appeared that the merger had been approved by a majority of disinterested directors.

Chancellor Allen analyzed the conflicts of interest under a "materiality" standard, in which a plaintiff would have to show first that the conflict was sufficiently substantial to impair the individual director's judgment,[35] and second, that the conflicts of individual directors were so substantial as to impair the independence of the entire board.[36] Finding that plaintiffs failed to make the second showing, the Chancellor dismissed the duty of loyalty claim.[37] On appeal, the Delaware Supreme Court, uncertain about

30. DEL. CODE ANN. tit. 8 § 102(b)(7) (1990). *See infra* text accompanying notes 178-179.

31. *See infra* text accompanying notes 140-142.

32. 634 A.2d 345 (Del. 1993).

33. It took place on October 29, 1982. *Id.* at 356.

34. 1991 Del. Ch. LEXIS 105 (Del. Ch. July 12, 1990), *aff'd in part, rev'd in part*, 634 A.2d 345 (Del. 1993).

35. *Technicolor*, 1991 Del. Ch. LEXIS 105 at *11-12.

36. *Id.* at *37-38.

37. *Id.* at *37-38, 82.

several novel aspects of the Chancellor's duty of loyalty analysis, remanded for further consideration.[38]

The duty of care issues in *Technicolor* appeared much more straightforward. The board had certainly not had the notice or information required prior to action under *Van Gorkom*, and Chancellor Allen had "grave doubts" that the board exercised due care.[39] Recently, in the related appraisal proceeding, however, Chancellor Allen also had determined that the merger price exceeded Technicolor's value at the time of the merger.[40] Applying standard tort principles, Chancellor Allen noted that a plaintiff alleging a breach of due care must show not only lack of due care, but also causation and damages.[41] In this case, even if the board had not exercised due care under *Van Gorkom* standards, the shareholders had received more than fair value for their shares and had therefore suffered no injury.[42] Accordingly, Allen dismissed the due care allegations.[43]

The Delaware Supreme Court, with uncharacteristic vehemence, found the Chancellor's application of standard tort principles to the duty of care improper and erroneous.[44] It held that once a breach of due care had been shown, the burden shifted under Delaware law, and it was up to the defendants to establish the intrinsic fairness of the merger under the stan-

38. Chancellor Allen's proposed rule would have dealt with the problem of structural bias by treating the board as a collective entity and analogizing it to an individual director. The Chancellor recognized the possibility that some individual conflicts could be so substantial as to not only make the director interested, but to deprive the whole board of independence. He also recognized that the question of board independence could only be analyzed with reference to the action the board actually took. The Delaware Supreme Court, however, expressed uncertainty about what kind of individual conflicts could deprive an entire board of independence, and recognized that this standard departed from the director-by-director analysis embodied in traditional Delaware law and in Delaware's interested director statute, *see, e.g.*, DEL. CODE ANN. tit. 8 §§ 141(a) & 144 (1990); *Technicolor*, 634 A.2d 345, 362-66 (Del. 1993). The Supreme Court directed reconsideration of the second prong of the Chancellor's proposed test, affirming the first prong as a "restatement of established Delaware law." *Id.* at 363.

39. *Technicolor*, 1991 Del. Ch. LEXIS 105, at *5-8; *Technicolor*, 634 A.2d at 369.

40. *Technicolor*, 1990 Del. Ch. LEXIS 171 (Del. Ch. 1990).

41. *Technicolor*, 1991 Del. Ch. LEXIS 105, at *41-43 (citing Barnes v. Andrews, 298 Fed. 614 (2d Cir. 1924)); *Technicolor*, 634 A.2d at 370-71. Both the plaintiff on appeal and the Supreme Court expressed mystification at the Chancellor's reliance on *Barnes*, referring to it as "obscure law" not cited by any of the parties. *Technicolor*, 634 A.2d at 369 n.38. It is not clear whether they were being disingenuous on this point, or are unaware that *Barnes* was a leading case in the Duty of Care section of the Cary (later Cary & Eisenberg) Corporations casebook, from the First through the Fifth Editions, in both the abridged and unabridged versions. Accordingly, generations of law students have considered and discussed the relevance of *Barnes* to duty of care issues. The case was dropped in the Sixth Edition, (first published in 1988) to make room for, among other things, *Van Gorkom*.

42. *Technicolor*, 1991 Del. Ch. LEXIS 105, at *58.

43. *Id.*

44. *Technicolor*, 634 A.2d at 367.

dard of *Weinberger v. UOP*.[45] The citation to *Weinberger* is significant, and may strike many as puzzling. *Weinberger* involved a freeze-out merger between a parent and subsidiary, a transaction that always raises a direct conflict of interest between majority and minority shareholders. The stringent intrinsic fairness standard generally has been seen as a judicial recognition that interested transactions of this type always present major dangers for abuse and must be strictly scrutinized.[46] In *Technicolor*, however, the Delaware Supreme Court seems to say that, even absent any conflict of interest, a breach of the duty of care yields the same stringent standard of scrutiny as a conflict of interest.[47]

Implicit in *Technicolor* is a conception of a director's duty of care as one element of a broader fiduciary duty which the Court describes as comprising the "*triads* of their fiduciary duty—good faith, loyalty or due care."[48] Proof of a breach of any one of these elements deprives the defendant of the benefits of the business judgment rule and imposes an intrinsic fairness standard of review.[49] By dividing director fiduciary duties into three parts instead of two, Justice Horsey further implies that there is nothing special about the duty of care. His view seems to be that a conscientious director has just as much of an obligation to be reasonably informed as he does to act in good faith and avoid conflicts. Failure to comply with any of these requirements results in much the same legal consequence, namely the imposition of a strict standard of review of the questioned action.[50] In support of this integrated view of fiduciary duties, Justice Horsey quotes approvingly Chancellor Allen's observation that the so-called "*Revlon* duty" (which the Technicolor board was also alleged to have violated by not seeking out higher bidders) was nothing more than a manifestation of the general *Van Gorkom* obligation on directors to be reasonably informed.[51]

45. *See id.* (citing Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)). Intrinsic fairness requires both fair dealing and fair price. *Weinberger*, 457 A.2d at 711. Fair dealing embraces questions of the timing of the merger, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. *Id.* Fair price relates to the economic and financial considerations of the merger, including all relevant factors: market value, future prospects, other offers and any other elements that affect the intrinsic or inherent value of a company's stock. *Id.*

46. *See, e.g.*, Robert Clark, Corporate Law 525 (1986) (*Weinberger* "reaffirmed the position that [in a parent-subsidiary merger] the merger involves an inherent conflict of interest, and that the burden of proof is therefore on the fiduciaries to prove the entire fairness of the transaction. . . .").

47. *Technicolor*, 634 A.2d 345, 367 (Del. 1993).

48. *Id.* at 361 (emphasis in original).

49. *Id.*

50. *Id.* at 367.

51. The quoted language interprets *Revlon* as an application of the duty of care. The Chancellor stated:

> [T]he due care theory and the *Revlon* theory do not present two separate legal theories

In short, *Technicolor* represents an effort by the Delaware Supreme Court to remove doctrinal distinctions between duty of care liability and other breaches of fiduciary duty. Rather than analogize duty of care cases to other tort cases, as the Chancery Court did, Justice Horsey insists that the appropriate analogy is to other fiduciary duty cases. Just as in interested director cases, and unlike negligence cases, proof of a breach of fiduciary duty alone is sufficient to justify intrinsic fairness review. *Technicolor* may therefore be seen as a step toward a single standard of fiduciary duty, unifying treatment of the breaches of due care and loyalty.[52]

QVC *AND THE END OF* REVLON *DUTIES*

Under traditional concepts of fiduciary duty in Delaware corporate law, all management actions fell into one of two categories, those taken by interested directors and those taken by disinterested ones.[53] Actions by interested directors were scrutinized under the intrinsic fairness standard,[54] while disinterested transactions were subject to the presumptions of the business judgment rule.[55] The hostile takeover battles of the 1980s, however, presented Delaware courts with managerial actions not easily characterized as either interested or disinterested. As a result, the Delaware Supreme Court in several cases worked to develop specialized legal standards to address these special circumstances.

> justifying shareholder recovery. . . . Both theories reduce to a claim that directors were inadequately informed (of alternatives, or of the consequences of executing a merger and related agreements). An auction is a way to get information. A pre- or post-agreement market-check mechanism is another, less effective but perhaps less risky, way to get information. A "lock-up" is suspect because it impedes the emergence of information in that an alternative buyer that would pay (or would have paid) more is less likely to emerge once such an impediment is in place.

Id. at 370-71 n.37 (quoting *Technicolor*, 1991 Del. Ch. LEXIS 105, at *54).

Note that this reinterpretation of *Revlon* and its progeny as applications of the duty of care enables Justice Horsey to argue that *Technicolor* is not the first time that the intrinsic fairness standard has been applied to a breach of the duty of care. He cites Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988) as a prior instance, *Technicolor*, 634 A.2d at 371, although the management buyout context in which that case arose raised strong conflict of interest problems as well. *See Macmillan*, 559 A.2d at 1286-87.

52. The Delaware Supreme Court took the same position in *In re Tri-Star Pictures, Inc.*, 634 A.2d 319 (Del. 1993), and the Delaware Chancery Court has followed this approach. *See* Orban v. Field, 1993 Del. Ch. LEXIS 277, at *15 (Dec. 30, 1993) ("in light of the holdings [of *Technicolor* and *Tri-Star*], I conclude that plaintiffs need not plead (or at trial prove) that they have been injured as an element of their claim and thus the failure to do so cannot be fatal on a [motion for summary judgment]").

53. *See* The American Law Institute, Principles of Corporate Governance, §§ 1.15, 1.23 (1992) for definitions based on these understandings. As noted previously, duty of care liability, prior to *Van Gorkom*, was virtually nonexistent. *See supra* note 25 and accompanying text.

54. *E.g.*, Sinclair Oil Corp. v. Levian, 280 A.2d 717 (Del. 1971).

55. *E.g.*, Puma v. Marriott, 283 A.2d 693 (Del. Ch. 1971).

In *Unocal Corp. v. Mesa Petroleum Co.*, the court decided that following the announcement of a hostile takeover proposal, all director actions reasonably characterized as defensive were subject to enhanced duties and heightened scrutiny.[56] This required directors to demonstrate "reasonable grounds for believing that a danger to corporate policy and effectiveness existed"[57] and that all defensive devices were "reasonable in relation to the threat posed."[58] In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the board's initial defenses against a hostile bust-up bid met *Unocal's* threat/proportionality test.[59] The court found, however, that once management's white knight defense also involved bust-up financing, the sale of the company became inevitable and the board could no longer claim to be protecting against that threat.[60] As a result, the Delaware Supreme Court held that a new duty arose once the sale of a company became inevitable. The new duty was to maximize immediate shareholder value by auctioning the company.[61] Notable among the many later cases in which the Delaware courts applied *Unocal* or *Revlon* is *Paramount Communications, Inc. v. Time, Inc. (Time-Warner)*.[62] This case announced that *Revlon* would be triggered when the board began an active auction of the company, as in *Mills Acquisition Co. v. Macmillan, Inc.*,[63] but would not be triggered when the board sought to protect and implement an extraordinary corporate transaction as part of its long-term strategy.

In *QVC Network, Inc. v. Paramount Communications, Inc.*,[64] the Delaware courts revisited the issues raised in this series of cases. The contest for control of Paramount began when Paramount and Viacom agreed to merge.[65] QVC subsequently announced a competing hostile tender offer for fifty-one percent of Paramount's stock for cash and an intention to effect a second-step merger of the remaining forty-nine percent for equity in the combined enterprise. Viacom responded with a tender offer of its own, structured in substantially the same way. Following this proposed Viacom-Paramount transaction, which Paramount's board favored, Viacom Chairman Sumner Redstone would own seventy percent of the combined entity.[66]

56. 493 A.2d 946, 954 (Del. 1985) ("there is an enhanced duty which calls for judicial examination").

57. *Id.* at 955.

58. *Id.*

59. 506 A.2d 173, 181 (Del. 1986).

60. *Id.* at 182.

61. *Id.*

62. 571 A.2d 1140 (Del. 1990).

63. 559 A.2d 1261 (Del. 1988).

64. 635 A.2d 1245 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1994).

65. *Id.* at 1258.

66. Paramount entered into a series of takeover defense mechanisms with Viacom—among others, a termination fee, a stock option and a waiver of its poison pill for Viacom but not for QVC. *Id.* at 1253. Because these mechanisms would make it extremely expensive for QVC's bid to compete with the Viacom bid, QVC sued to enjoin them. *Id.* at 1254. Paramount shareholders also commenced a class action, which was consolidated with QVC's action.

QVC *In The Chancery Court*

In the argument before the Chancery Court in *QVC*, all parties assumed that a crucial legal question would be whether the Paramount directors, by agreeing to the Viacom transaction, had triggered *Revlon*, and become subject to a duty to maximize immediate shareholder value.[67] QVC and Paramount shareholders, citing *Revlon* and *Macmillan*, argued that *Revlon* was triggered by a "change of voting control" (which the Viacom deal undoubtedly was).[68] Paramount's board and Viacom, relying on *Time-Warner*, argued that *Revlon* duties were only triggered where a company initiates an auction or a transaction seeking to break it up (which the Viacom deal was not).[69] At most, Paramount's board and Viacom contended, *Unocal* proportionality review applied.[70]

In his opinion, Vice Chancellor Jacobs announced that he would not delineate the circumstances that triggered *Revlon*, except to say they were triggered by the particular circumstances of this case.[71] Those particular circumstances were that majority voting control of Paramount was being sold, by the public shareholders, to Sumner Redstone.[72] This was one of the most significant events in a corporation's life,[73] and the only opportunity reasonably available to Paramount shareholders to obtain a control premium for their shares.[74] Yet the Paramount board, by the use of defensive tactics, had made the decision to sell control on their own, effectively taking the decision away from the shareholders.[75] Delaware law empowered the board to take such action but that power is accompanied by the duty "to do for the shareholders what the shareholders would otherwise do for themselves—to seek the best premium-conferring transaction that is available in the circumstances."[76]

The attorneys in the case—and indeed many practitioners of Delaware law—understood the Vice Chancellor's determination that *Revlon* duties applied, to require the Paramount board to conduct an auction (and the board in fact subsequently did so).[77] The Vice Chancellor took a markedly different approach, however, announcing that "*Revlon* and *Unocal* do not

67. *Id.* at 1261.
68. *Id.*
69. *Id.* at 1263-64.
70. *Id.*at 1264.
71. *Id.* at 1265.
72. *Id.*
73. *Id.* at 1266.
74. *Id.*
75. *Id.*
76. *Id.* Vice Chancellor Jacobs derived this standard from Barkan v. Amsted Indus., Inc., 567 A.2d 1279 (Del. 1989), and two unpublished Chancery Court opinions, *In re* Fort Howard Shareholders Litig., 1988 Del. Ch. LEXIS 110 (Del. Ch. 1988) and Roberts v. General Instrument Corp., 1990 Del. Ch. LEXIS 138 (Del. Ch. 1990).
77. *See supra* note 17.

represent any departure from bedrock fiduciary principles."[78] Drawing on *Technicolor*,[79] Vice Chancellor Jacobs noted that *Revlon* is simply a particularized application of the duty of care, and only requires directors "to establish that their decision was adequately informed."[80] As a result, *Revlon* does not categorically require a board to conduct an auction or take any other particular action.[81] In short:

> [W]hat is critical is that the board be able to demonstrate that its business judgment was reasonable and adequately informed, consistent with the enhanced judicial scrutiny applied here. It is in this sense that the directors' duties under *Revlon* and their fundamental due care obligation to adequately inform themselves converge.[82]

Finding that the Paramount board failed to inform itself adequately about the QVC offer before adopting the defensive tactics at issue, the Vice Chancellor enjoined Paramount's use of those tactics.[83]

QVC *In The Supreme Court*

Only hours after hearing oral argument in the appeal of the Chancery Court's ruling in *QVC*, the Delaware Supreme Court issued an order affirming it.[84] In that order, *Revlon* is cited only once, as part of a string of citations to every major fiduciary duty opinion issued by the Delaware Supreme Court in the last ten years.[85] Rather than being subject to *Revlon* duties, the order states that the Paramount board's decisions were subject to "enhanced scrutiny,"[86] under which the courts must determine if the board's decisions were "on balance, within a range of reasonableness."[87] The order says ". . . in the end the Court of Chancery and this Court must be satisfied that the course of action determined by the directors, in the context of a sale of control, was reasonably calculated to secure the best value available to the Paramount stockholders."[88]

78. *QVC*, 635 A.2d at 1267.

79. 634 A.2d 345 (Del. 1993).

80. *QVC*, 635 A.2d at 1267 and n.43.

81. *Id.*

82. *Id.*

83. *Id.* at 1271-72.

84. Paramount Communications, Inc., v. QVC Network Inc., 1993 Del. LEXIS 440, Fed. Sec. L. Rep. (CCH) ¶ 98,000 (Del. Dec. 9, 1993) [hereinafter Supreme Court Order].

85. *Id.* at *5-6.

86. *Id.* at *6.

87. *Id.* at *6. Interestingly, as sources for this enhanced scrutiny standard the Court cites Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989), and Nixon v. Blackwell, 626 A.2d 1366, 1378 (Del. 1993), but not *Revlon*.

88. *Supreme Court Order*, *supra* note 84 at *7.

The Supreme Court's formal opinion in *QVC*, written by Chief Justice Veasey, was issued two months later.[89] In that opinion, the phrase "*Revlon* duties" is almost completely absent.[90] As in the order, the sale of control to Redstone is said to have triggered "enhanced scrutiny," expressly defined in the opinion as more exacting than the business judgment rule but less exacting than "entire fairness."[91] Chief Justice Veasey tells us that "[t]he decisions of this Court have clearly established the circumstances where such enhanced scrutiny will be applied."[92] To support this proposition, the Chief Justice cites two prior cases that applied the *Unocal* standard, two that imposed *Revlon* duties, and one that minimized the distinction between *Revlon* and *Unocal* duties.[93]

The court then stated that the circumstances yielding enhanced scrutiny review in *QVC* were (i) "the approval of a transaction resulting in sale of control" and (ii) "the adoption of defensive measures in response to a threat to corporate control."[94] The juxtaposition is intriguing because the sale of control has generally been thought to be a *Revlon* trigger, while adoption of defensive tactics in response to a control threat is the classic *Unocal* trigger.[95] Finally, the court emphasized that enhanced scrutiny was required because a reduction of voting power and alteration of voting rights were also at stake.[96]

If the *QVC* opinion contained no other doctrinal discussion, the foregoing statements would constitute substantial evidence that the Delaware Supreme Court had adopted a single intermediate standard of enhanced scrutiny for all management actions significantly affecting corporate control, and had abolished the separate *Revlon* and *Unocal* duties. If that were the case, our thesis would be proven (and this Article could have been much shorter). In fairness, however, and to give a complete account of the Supreme Court's opinion, we must point out that there is additional doctrinal discussion in *QVC* which can be read to imply that the sale of control does impose special obligations on directors, which might appear to some to be a watered down version of *Revlon* duties. For reasons ex-

89. *QVC*, 637 A.2d 34 (Del. 1994).

90. It appears twice in long block quotations from *Macmillan* and *Time-Warner*, and once in quotation marks that clearly refer to the prior *Time-Warner* quote. *Id.* at 45.

91. *Id.*

92. *Id.* at 42.

93. The five cases are *Unocal Corp.*, 493 A.2d 946; Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (*Unocal* duties); *Revlon*, 506 A.2d 173 and *Macmillan*, 559 A.2d 1261(*Revlon* duties); and Gilbert v. El Paso, 575 A.2d 1131 (Del. 1990) (denying the distinction). *See infra* text accompanying notes 109-133.

94. *QVC*, 637 A.2d at 42.

95. *See id.* at 42. The approach follows precisely that taken in *Supreme Court Order*, 1993 Del. LEXIS 440 at *10: "The change of control feature and the defensive aspects of the Paramount-Viacom transaction, each independently, subjected the directors' decisionmaking to enhanced scrutiny to determine reasonableness."

96. *QVC*, 637 A.2d at 42.

pressed below, however, we believe the language and logic of *QVC* is moving the Delaware courts toward a single unified standard and away from the *Revlon/Unocal* distinction.

The Unified Standard in QVC

Like Vice Chancellor Jacobs, the Delaware Supreme Court in *QVC* emphasized that control under the Paramount-Viacom transaction was to be transferred from the public stockholders to a controlling stockholder.[97] It said the decision by Paramount's board to facilitate that transaction created an obligation to "realize for the stockholders the best value reasonably available."[98] That standard, however, does not prescribe particular actions that boards are required to take.[99] Indeed, it acknowledges that boards have considerable leeway in determining what constitutes the "best value reasonably available."[100] Among the factors directors are expressly permitted to consider are their own and their advisor's valuation of any noncash consideration, the risk factors of illegality or nonconsummation, the bidder's business plans for the corporation and their effects on stockholder interests, and the future value of a strategic alliance.

In light of these points and the customary way of analyzing Delaware fiduciary law, it can be argued that *QVC* has retained the concept of *Revlon* duties, broadened it to apply to all management decisions to change or sell control, and watered it down from a duty to maximize immediate shareholder value to a duty to obtain the best value reasonably available.[101] But such views fail to recognize that the looser, more general standard announced in *QVC* is potentially applicable not just to management decisions to sell control, but to all management decisions involving potential changes in control. Indeed, it could apply to all management decisions that substantially alter shareholder interests in the corporation.

One key question therefore is whether the same duty to obtain the best value reasonably available for shareholders, reviewed under an enhanced scrutiny standard, would also be applied by the Delaware courts to management who resist an unwanted takeover. The Delaware Supreme Court's decision in *QVC* explicitly recognizes this question, and then refuses to

97. *Id.* at 43.

98. *Id.*

99. *See id.* at 43-44. (possible methods of meeting obligation "include conducting an auction, canvassing the market, etc. Delaware law recognizes that there is 'no single blueprint' that directors must follow.").

100. *Id.* at 44.

101. One of us has previously expressed a similar view in commenting on Vice Chancellor Jacobs's opinion in *QVC*. *See* Randall Smith & Johnnie L. Roberts, *Court Blocks Acquisition of Paramount by Viacom*, WALL ST. J., Nov. 26, 1993, at A3 (quoting Yablon to the effect that Jacobs's opinion limits the scope of *Time-Warner* and expands the definition of what kinds of sales trigger the enhanced duties under *Revlon*.). Obviously, one of us has changed his mind.

answer it.[102] As careful jurists, the judges in *QVC* limited their holding to the precise facts of the case. Nonetheless, we believe there is much in both the language and logic of the *QVC* opinion that will lead the Delaware courts to apply the new unified intermediate standard to all managerial actions in control contexts, including the decision to remain independent.

First, consider the language of *QVC*. Chief Justice Veasey notes that the special obligation to obtain the best value reasonably available to the shareholders is based on the " 'fundamental duties of care and loyalty'."[103] He defines "enhanced scrutiny" as an intermediate standard located between business judgment and intrinsic fairness review, and as embodying both *Revlon* and *Unocal*.[104] Indeed, Chief Justice Veasey expressly identifies the enhanced scrutiny in sales of control by referencing a line of Delaware cases that apply enhanced scrutiny to managerial decisions altering or restricting shareholder voting power.[105] In short, much of the language of *QVC* envisions a single intermediate standard of review which would apply enhanced scrutiny to all managerial decisions that significantly alter or affect shareholder interests.

Second, the duty to seek the best value reasonably available to stockholders, unlike the old *Revlon* duty, can coherently be applied to a wide variety of managerial decisions. Once the need for immediate value maximization is jettisoned and a notion of reasonableness added, many board actions—including adopting a poison pill, resisting an unwanted takeover, changing voting rights, or even recapitalizations—can all be justified as measures that enable the board to achieve the best value reasonably available to shareholders. In every case, enhanced scrutiny can be applied to ensure that the decision was fully informed and reasonable under the circumstances. The *QVC* standard, broadly applied, makes possible precisely the kind of flexible, fact-based, case-by-case inquiry so characteristic of Delaware corporate law opinions. As such, it is far more likely to be broadly applied than the old *Revlon* standard.

Nevertheless *Time-Warner* can be used to argue that Delaware courts will apply a weaker, more lenient standard when a board simply uses defensive tactics to resist an unwanted takeover attempt and stay independent.[106] It should be noted however, that *QVC* involved a board (Paramount) deploying defensive tactics to resist an unwanted takeover (QVC's). Although Paramount's board did so to preserve the deal with Viacom and not to preserve Paramount's independence, Delaware courts may find it difficult to justify a distinction requiring management to maximize value

102. *QVC*, 637 A.2d at 43 n.13.

103. *Id.* at 43. (quoting Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989)).

104. *Id.* at 45.

105. *Id.* at 42 n.11 (citing, among other cases, Schnell v. Chris-Craft Indus., 285 A.2d 437 (Del. 1971); Stroud v. Grace, 604 A.2d 75 (Del. 1992); and Blusius Indus. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988)).

106. *QVC*, 637 A.2d at 47-48.

when choosing among alternative control transactions but permitting them not to do so when they choose to remain independent. Once again, the greater management discretion embodied in the *QVC* standard makes it potentially applicable to "just say no" situations in a way that the *Revlon* duty was not.[107]

In other words, if future Delaware courts do not apply the *QVC* standard to managerial decisions to remain independent, what doctrinal standard will they apply? Using a poison pill to resist an unwanted takeover is clearly subject to intermediate review under *Unocal*, and *QVC* strongly identifies that standard with enhanced scrutiny review. Is it likely that a Delaware court would hold that management can choose independence even when the board cannot show that it has a reasonable basis for believing that such action will, at least in the long or medium run, provide the best value reasonably available to shareholders?

The unified standard is highly fact and context specific, but so is much of Delaware fiduciary duty law. Delaware courts may be inclined to find a decision to remain independent reasonable, particularly when management has well informed plans to improve corporate performance and shareholder value, augmented by pro forma financials and other quantitative data from outside consultants.[108] We believe, however, that Delaware courts, in reviewing such management decisions, are likely to apply the doctrinal standard of *QVC* rather than expressly recognize a lesser standard for managerial decisions to remain independent.

Finally, the Delaware courts may find it desirable to apply a single intermediate standard to all these cases precisely because it will make all the

107. The *QVC* standard seemingly conflicts with the very lenient review of board action contained in *Time-Warner*, which purported to apply a *Unocal* standard. Although the *QVC* court does not criticize *Time-Warner* or claim it is no longer good law, there is an effort to narrow the scope and significance of *Time-Warner*. The Delaware Supreme Court in *QVC* argues that its *Time-Warner* opinion did not expressly limit *Revlon* duties to "bust-up" situations or target-initiated auctions, and distinguishes *Time-Warner* from *QVC* on a factual basis, noting that Time, as the acquiring company in *Time-Warner*, was not undergoing a sale of control. *See id.* at 38. Throughout the rest of its opinion, however, the court analyzes the applicable legal principles and conducts its review on the premise of a sale of control generally. *E.g.*, *id.* at 38-41.

Some have argued that *QVC* and *Time-Warner* can be reconciled by interpreting the scope of the new *QVC* standard very narrowly, and applying the *QVC* standard only when there is a sale of majority control to an individual controlling shareholder, thereby creating the danger of freezeout mergers and making it impossible for public shareholders to participate in any future sales of control. But Delaware law has not previously recognized fiduciary duty rules that vary depending on the buyer's identity, and this would lead to more fragmentation and line-drawing problems in the law of fiduciary duty. Significantly, throughout most of the *QVC* opinion, the Court speaks simply of a "sale of control" without any consideration of the identity of the buyer. The distinction may make a difference in the context of the information to be reviewed and the reasonableness of board action, however. *See infra* text accompanying notes 167-173.

108. *See infra* text accompanying notes 159-179.

wrangling over *Unocal* or *Revlon* duties in takeover cases irrelevant. The legal standard in all such cases will be effectively the same, derived from the bedrock standard of fiduciary duty—whether the board was fully informed and acted reasonably. As the following discussion shows, much prior Delaware law evinced a desire for just such a unified standard.

DOCTRINAL TENSION IN DELAWARE FIDUCIARY LAW

As noted, *Unocal* was the Delaware Supreme Court's first effort to address the special problems posed by directors' use of defensive tactics in responding to hostile takeover attempts.[109] Whether it was necessary for the *Unocal* court to develop its new threat/proportionality standard as a separate duty restricting managerial action is open for question. Clearly the court sought to move away from a standard based solely on determining management's good faith or subjective entrenchment motivation, and saw the threat/proportionality test as an objective way to avoid investigating directors' subjective mind sets.[110] Whatever the reason, the court in *Revlon* found that *Unocal* duties had ceased and a new duty and doctrinal category arose, namely the duty to maximize immediate shareholder value when the company was for sale.[111]

The *Revlon* court held that in order to meet the obligation to maximize immediate shareholder value, the board was obligated to auction the company to the highest bidder.[112] Again, creation of a separate doctrinal category called "*Revlon* duties" was not the only way to reach that result. The court could have stated that it was applying *Unocal* to a situation in

109. It was not, of course, the first time the Delaware courts had dealt with hostile takeovers. In Cheff v. Mathes, 199 A.2d 548 (Del. 1964), the Delaware Supreme Court held that a corporate purchase of its shares at a premium from an unwanted suitor in order to remove a takeover threat was a valid business decision entitled to the ordinary presumptions of the business judgment rule, so long as the board had not acted for any improper purpose. Until *Unocal*, it was assumed that this same standard applied to all corporate actions to deter unwanted takeovers. Until about the time of *Unocal*, however, corporate defensive tactics had been notably ineffective in stopping hostile tender offers. What seems to have motivated the *Unocal* court was the greater acceptance and even advocacy of hostile takeovers by many business leaders, and the development, in the mid-1980s, of relatively effective corporate defensive tactics, most notably the "poison pill."

110. Note the observation of Chancellor Allen in Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. Ch. 1990), that "what is new in *Unocal*" is "judicial review of board decisions under an 'objective' standard." *Id.* at 1124.

111. Revlon, Inc. v. MacAndrews and Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986). ("The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. This significantly altered the board's responsibilities under the *Unocal* standards.").

112. *Id.* ("The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.").

which the defensive tactics were no longer reasonable.[113] Alternatively, a *Van Gorkom* analysis, based on the directors' failure to inform themselves about the alternative offer, could have sufficed.[114] Yet there was little doubt following these cases that there were two separate categories of duties and review in the takeover context, laying the groundwork for a deeper fragmentation in Delaware doctrinal law.

Perhaps the high water mark of this fragmentation appears in *Mills Acquisition Co. v. Macmillan, Inc.*[115] In that case, Justice Moore tried to sort out and render coherent all the distinct standards and duties that had entered Delaware law through *Revlon*, *Unocal* and their respective progenies. Referring to *Revlon* and *Unocal*, Justice Moore observed at the outset that "application of the correct analytical framework is essential to a proper review of the challenges to the decision-making process of a corporate board."[116] This was essential because determining that correct analytical framework was frequently outcome determinative.[117]

Determining the correct analytical framework in *Macmillan* seemed straightforward to the court because there was no question that the company was for sale.[118] The issue was "the scope of the board's responsibility in an active bidding contest once their role as auctioneer [had] been in-

113. This was certainly the view of *Revlon* expressed in such later cases as Barkan v. Amsted Indus., 567 A.2d 1279, 1286 (Del. 1989); Gilbert v. El Paso Co., 575 A.2d 1131 (Del. 1990); and Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53 (Del. 1989). *See infra* text accompanying notes 125-139.

114. This view of *Revlon* duties as a particular application of more basic duty of care principles can be found expressed in a line of cases beginning with Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1284 n.34 (Del. 1988), through *Barkan*, 567 A.2d at 1286, and recently restated in both the Chancery and Supreme Court opinions in *Technicolor* and *QVC*. *See infra* text accompanying notes 122-129.

115. 559 A.2d 1261 (Del. 1988).

116. *Id.* at 1279.

117. *Id.* (quoting AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986)). There is an interesting irony, and a slight shift in meaning, in this citation to *AC Acquisitions*. In *AC Acquisitions*, Chancellor Allen was implicitly criticizing the all-or-nothing approach of prior Delaware law, under which management action was judged under either the extremely lenient business judgment rule, or the extremely harsh intrinsic fairness test. Noting that these choices were "frequently . . . determinative of the outcome of derivative litigation," he applauded the *Unocal* standard for providing a "more flexible intermediate form of judicial review." *Id.*

In quoting this language in *Macmillan*, however, Justice Moore is implicitly criticizing the Chancery Court for not specifying the precise standard of review it applied to the board's action, noting that the standard of review is frequently outcome determinative. In short, Chancellor Allen's statement was an attempt to promote flexibility and equity in fiduciary duty law, while Justice Moore's citation of it was an attempt to promote clarity and analytic rigor. The unified standard may be seen as a resolution of this tension. *See infra* text accompanying notes 139-158.

118. *Macmillan*, 559 A.2d at 1285 (case did not require "a judicial determination of when Macmillan was 'for sale' [because] [b]y any standards th[e] company was for sale" at all times relevant to the proceeding).

voked under *Revlon*."[119] In attempting to clarify the relationship between *Revlon* and *Unocal*, the court said that under *Revlon* the board's duties during the sale of the company are " 'significantly altered' "[120] and the "defensive aspects of *Unocal* no longer apply."[121] The obligation is to enhance the bidding process for the stockholders' benefit.[122] In fulfilling that obligation, however, the decisions made are governed by a *Unocal* standard: they must be reasonable in relation to the advantage sought.[123]

While the *Macmillan* court seemed to be attempting to show how *Unocal* and *Revlon* could work together to address the complex circumstances of a multi-party takeover battle, it did not resolve the critical threshold issue of what constitutes a sale triggering *Revlon*, and ended up adding yet another doctrinal box to the framework.[124] As a result, the analytical framework erected in *Unocal*, *Revlon* and *Macmillan* was subjected to significant pressure in the late 1980s, as legal arguments in later cases sought to expand, contract or manipulate the various new categories of legal duties

119. *Id.*

120. *Id.* (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 181-82 (Del. 1986)).

121. *Id.*

122. *Id.* at 1286-87.

123. *Id.* In this rather complex part of the opinion, the court seems torn between viewing *Revlon* duties as analytically distinct from *Unocal* duties, and viewing the *Revlon* case as just an application of the more general principles of *Unocal*. Consider the following quotations from *Macmillan*, all of which appear within a few pages of each other:

> Under these special circumstances [invoking *Revlon*] the duties of the board are "significantly altered." The defensive aspects of *Unocal* no longer apply. The sole responsibility of the directors in such a sale is for the shareholders' benefit.

Id. at 1285 (citations omitted).

> In the absence of self-interest, and upon meeting the enhanced duty mandated by *Unocal*, the actions of an independent board of directors in designing and conducting a corporate auction are protected by the business judgment rule. Thus, like any other business decision, the board has a duty in the design and conduct of an auction to act in "the best interests of the corporation and its shareholders."

Id. at 1287 (citing *Unocal*) (citations omitted).

> As we held in *Revlon*, when management of a target company determines that the company is for sale, the board's responsibilities under the enhanced *Unocal* standards are significantly altered. Although the board's responsibilities under *Unocal* are far different, the enhanced duties of the directors in responding to a potential shift in control, recognized in *Unocal*, remain unchanged. This principle pervades *Revlon*, and when directors conclude that an auction is appropriate, the standard by which their ensuing actions will be judged continues to be the enhanced duty imposed by this Court in *Unocal*.

Id. at 1287 (citations and footnotes omitted).

124. *See infra*, Appendix.

the courts had created, precisely because so much was seen to turn on them.[125]

Yet even as the Delaware courts were developing the multifaceted classificatory scheme established by *Unocal*, *Revlon* and *Macmillan*, they were clearly troubled by the fragmentation of Delaware law it necessarily entailed. In the very same cases where the Delaware courts were determining which of these cases provided the appropriate standard for reviewing a particular management action, the courts were also insisting that there was no fundamental difference in the standards. Indeed, they recognized that the easiest way to do this was to transform the *Revlon* duty from a duty to run an auction or maximize immediate shareholder value, to a more vague, general duty to act reasonably to obtain the best value (long or short term) for shareholders. In other words, they were moving precisely towards the intermediate scrutiny standard of *QVC*.

Barkan v. Amsted Indus.,[126] for example, illustrates the move toward the intermediate scrutiny standard of *QVC*. In *Barkan*, which involved a management buyout, the Delaware Supreme Court, while holding that no violation of a *Revlon* duty had been shown in that case, insisted there was no fundamental difference between the duties of management under *Unocal* and *Revlon*. Instead, "there is no single blueprint that a board must follow to fulfill its duties" and "the basic teaching of these precedents is simply that the directors must act in accordance with their fundamental duties of care and loyalty."[127]

More fundamentally, in *Gilbert v. El Paso Co.*,[128] the court minimized the difference between "traditional business judgment analysis" and *Unocal*, arguing that both acknowledge "that courts should not impose their own business judgment upon independent directors who reasonably respond to a threat to the corporate enterprise in good faith and on an informed basis."[129] The court proceeded to minimize the distinction between *Unocal* duties and *Revlon* duties, arguing that although by the time of the decisions in question "it had become apparent that the breakup of the company was inevitable," and *Revlon* duties therefore applied, "[t]his change in focus . . . did not alter the Board's continued duties of care and loyalty under *Unocal*."[130] Moreover, in *Interco*,[131] Chancellor Allen minimized the

125. Perhaps the most colorful expression of this view in the case law is Chancellor Allen's description of *Revlon* as the "radically altered state," in TW Services Inc. v. SWT Acquisition Corp., 1989 Del. LEXIS 19 at *26 (Del. Ch. 1989).

126. 567 A.2d 1279 (Del. 1989).

127. *Id.* at 1286. The *Barkan* Court sought to describe *Revlon* duties as nothing more than a particular application of the general standard for defensive tactics contained in *Unocal*, and *Unocal* itself as simply applying a slightly altered version of the business judgment rule.

128. 575 A.2d 1131 (Del. 1990).

129. *Id.* at 1145 n.29.

130. *Id.* at 1146.

131. City Capital Assocs. v. Interco Inc., 551 A.2d 787 (Del. Ch. 1988).

differences between basic fiduciary duties, *Unocal* duties, and *Revlon* duties, arguing again that *Revlon* should not be seen as imposing a unique auction duty on boards.[132]

Finally, in *Citron v. Fairchild Camera & Instr. Corp.*,[133] the Delaware Supreme Court denied, once again, that there was any real difference between the duties imposed on boards by *Unocal* and *Revlon*, stating "[t]o the extent that *Revlon* instructs a board to obtain the best available transaction for its shareholders," the obligation had been met and the board "studiously endeavored to avoid 'playing favorites,' consistent not only with *Revlon* but with any 'enhanced' duty . . . enunciated under *Unocal*."[134]

In addition to these expressions of a desire for a unified standard in the defense and auction contexts, other Delaware cases of this period also reflect a strong tendency to view the duty of care and duty of loyalty, at least in tender offer situations, as part of a single unified duty to act reasonably on the basis of adequate information.[135] While *Van Gorkom* was widely understood to impose duty of care obligations on incumbent management in control situations and *Unocal* to impose a heightened duty of loyalty, the post-*Revlon* cases announced that the *Revlon* duty, whatever it is, is a result of both the duty of care and duty of loyalty.[136] Moreover, because *Revlon* was being described as simply a specialized application of *Unocal*, it was possible to conclude that all post-*Unocal* corporate control cases would be governed by a single intermediate legal standard of review that includes both duty of care and duty of loyalty considerations.[137] Ac-

132. *Id.* at 802:

> The contours of a board's duties in the face of a takeover attempt are not, stated generally, different from the duties the board always bears: to act in an informed manner and in the good faith pursuit of corporate interests and only for that purpose. *Unocal*, of course, adds that where the board acts to defeat such an offer, its steps must be reasonable in light of the threat created by the offer. But I do not think that *Revlon* intended to narrowly circumscribe the range of reactions that a board may make in good faith to an attempt to seize control of a corporation.

133. 569 A.2d 53 (Del. 1989).

134. *Id.* at 68. In Roberts v. General Instrument Corp., 1990 Del. Ch. LEXIS 138 at *24-5 (Del. Ch. 1990), the court attempted to synthesize the holdings of *Macmillan*, *Barkan* and *Fairchild*, to arrive at the following unified test for dealing with all issues of corporate control:

> In such a setting the additional level of inquiry comes to this: whether the circumstances afford a disinterested and well motivated director a basis reasonably to conclude that if the transactions contemplated by the merger agreement close, they will represent the best available alternative for the corporation and its shareholders.

135. *E.g.*, Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987); *In re* J.P. Stevens & Co. Shareholder Litig., 542 A.2d 770 (Del. Ch. 1988); Sutton Holding Corp. v. DeSoto, Inc., 1991 Del. Ch. LEXIS 85 (Del. Ch. 1991).

136. *E.g.*, Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1284 n.34 (Del. 1988).

137. In this context, one should also note Chancellor Allen's decision in Stahl v. Apple Bancorp, 579 A.2d 1115, 1124-25 (Del. Ch. 1990), stating that the "compelling justification" standard for directors' actions which arguably interfere with the shareholder franchise, Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988), and the "enhanced scrutiny" standard of *Unocal*, "resemble each other."

cordingly, the elucidation of such a standard in *QVC* is, in an important sense, perfectly consistent with prior case law and indeed marks a consummation of the direction of that case law.[138]

SOURCES OF THE JUDICIAL DESIRE FOR A UNIFIED STANDARD

The tension implicit in the Delaware cases of the late 1980s between fragmentation and unification makes the stronger statements of unification in *QVC* and *Technicolor* rather unsurprising. The fragmentation of Delaware law had led to a system in which the classification of cases, particularly the classification of a case as falling within or outside the "*Revlon* zone," was seen as dispositive. Yet the class of cases that fell within *Revlon* remained unclear and ill-defined. More importantly, there was no coherent rationale in the case law for determining when a case should be subject to stringent *Revlon* duties.[139]

Under such circumstances, there is an increased danger and perception of inequitable results, because arguably similar cases are treated quite differently, depending on whether or not they are deemed to fall within the *Revlon* zone. Practitioners have increased opportunity to manipulate the legal standards applicable to the deal by structuring economically equivalent transactions in different legal forms. Finally, there is the risk of sacrificing the internal coherance and legitimacy in Delaware corporate

138. The move to a unified standard is also reflected in the context of disclosure obligations, where the Delaware Supreme Court has rejected the proposition that there is a separate "duty of candor" under Delaware law. Stroud v. Grace, 606 A.2d 75, 83-84 (Del. 1992) ("It is more appropriate for our courts to speak of a duty of disclosure based on a materiality standard rather than the unhelpful terminology that has crept into Delaware court decisions as a 'duty of candor'."). The Delaware Supreme Court has treated this disclosure duty as simply another aspect of the basic fiduciary duties of care and loyalty. Zirn v. VLI Corp., 621 A.2d 773, 778 (Del. 1993) ("The requirement that a director disclose to shareholders all material facts bearing upon a merger vote arises under the duties of care and loyalty.").

139. Determining when a sale occurred for purposes of triggering *Revlon* was never entirely clear. The break-up involved in *Revlon* and the active auction conducted in *Macmillan* were about as clear as it got. For example, the court in *Time-Warner*, distinguishing the sales in those cases, decided that Time's strategic combination with Warner Communications was not a sale of Time. Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1149 (Del. 1990). In other cases, the meaning of sale was far more opaque. *Compare*, Robert M. Bass Group, Inc. v. Evans, 552 A.2d 1227 (Del. Ch. 1988) (recapitalization and restructuring in which management would end up owning 39% of one of two companies resulting from it, is a sale); and Black & Decker Corp. v. American Standard, Inc., 679 F. Supp. 1183 (D. Del. 1988) (applying Delaware law) (a recapitalization in which management would end up owning 55% of the voting stock is a sale) *with* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1988) (agreement whereby an existing shareholder would increase its ownership interest from 26% to 49% is not a sale) and City Capital Assocs. Ltd. Partnership. v. Interco Inc., 551 A.2d 787 (Del. Ch. 1988) (sale of a major division as part of a restructuring is not a sale).

law. Given these concerns, we believe the primary reasons for the recent move to a unified standard in Delaware law are internal considerations of coherence and legal craft, rather than a response to policy concerns or a desire to make life easier or harder for incumbent management.

NO EXTERNAL PRESSURE FOR A UNIFIED STANDARD

The desire for a unified standard certainly was not the result of criticism from legal academics or practitioners. The post-*Revlon* commentary in law review articles and other professional publications tended to fall into two main categories, neither of which saw the fragmentation of legal standards as a significant problem. There was a descriptive literature which accepted and elaborated the fragmented classification scheme of the post-*Revlon* cases.[140] Noting the practical significance of a determination that *Revlon* duties applied, many of these articles focused on the unsettled question of what kind of management actions would trigger *Revlon*.[141] Accordingly, these articles tended to increase the perception among corporate practitioners of a fragmented legal standard where a "*Revlon* zone" existed and cases were treated very differently than under *Unocal*.[142] These articles also underscored the fact that the scope of the "*Revlon* zone" remained undefined.[143]

The other category of commentary was prescriptive, but rarely offered any critique of the fragmentation of Delaware law. Rather, these authors saw Delaware law in transition, and sought to direct that transition by

140. *See, e.g.*, John M. Olson, *The Fiduciary Duties of Insurgent Boards*, 47 Bus. Law. 1011 (1992); Barry Reder, *The Obligation of a Director of a Delaware Corporation to Act as an Auctioneer*, 44 Bus. Law. 275 (1989); Russell B. Stevenson, Jr., *The Unocal Standard's Application in Delaware: Evolving Case Law*, Nat'l. L. J., Nov. 14, 1988, at 22-25; W. John Moore, *Shareholder Value Uppermost, According to Revlon Opinion*, Legal Times, Mar. 17, 1986, at 2.

141. *See, e.g.* Dennis J. Block & Jonathan M. Hoff, *The Auction Process: Director Duties Revisited*, N.Y.L.J., Nov. 21, 1991, at 5; Theodore N. Mirvis, *What Triggers "Revlon"? Some New Answers*, N.Y.L.J., Dec. 3, 1990, at 5; Alan H. Paley, *A Look at "Revlon" Duties; What Are Directors' Obligations and When Do They Apply?*, N.Y.L.J., Sept. 11, 1989, at 39. This question was of course a great concern of corporate practitioners, who struggled to answer it in memoranda and other material prepared for client use. *E.g.*, Edward D. Herlihy & David A. Katz, Developments in Takeover Tactics and Defense (1990) (outline presented to Advanced Securities Law Workshop, copy on file with the authors).

142. Theodore N. Mirvis, *What Triggers "Revlon"? Some New Answers*, N.Y.L.J., Dec. 3, 1990, at 5-6. ("Revlon is the 'radically altered state' in which directors come under a categorical imperative to maximize immediate, short-term stockholder value. In Revlon land, only one thing counts: price. Only one time period counts: The present."); Daniel S. Cahill & Stephen P. Wink, *Time and Time Again the Board is Paramount: The Evolution of the Unocal Standard and the Revlon Trigger Through Paramount v. Time*, 66 Notre Dame L. Rev. 159, 182 (1990) ("The following cases serve to illuminate at least some of the shadowy corners of *Revlon*-land."). *See also* Ronald J. Rinaldi, Note, *Radically Altered States: Entering the "Revlon Zone,"* 90 Colum. L. Rev. 760 (1990).

143. *See* Ronald J. Gilson & Reinier Kraakman, *What Triggers Revlon?*, 25 Wake Forest L. Rev. 37, 56 (1990).

articulating the more theoretically legitimate and justifiable legal standards toward which Delaware law should proceed. Advocates of shareholders rights (and of a neo-classical economic methodology), for example, saw *Revlon* as the harbinger of a regulatory regime where managers' sole duty in corporate control transactions would be to maximize immediate shareholder value.[144] Those concerned about employees and other corporate constituencies saw *Time-Warner* as the first step in a regulatory regime that was protective of all corporate stakeholders.[145] Only a few commentators argued that the appropriate direction for Delaware law would be toward a more vague and loose, but more unified, standard for reviewing corporate actions.[146]

NO PUBLIC POLICY ARGUMENTS FOR A UNIFIED STANDARD

The changes in Delaware law revealed in *QVC* and *Technicolor* are unlikely a response to any recent changes in the market for corporate control, nor do they indicate a desire on the part of the Delaware judges to encourage or discourage more takeover contests. Although a three-year drought has existed in merger and acquisition activity, and *QVC* and *Technicolor* both penalize incumbent management for endorsing a questionable deal while failing to consider potentially better ones, it is doubtful that these cases represent a desire by the Delaware judiciary to help drum up more business for the M & A industry.[147]

144. *E.g.*, Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L. J. 71 (1989).

145. *See* Lyman Johnson & David Millon, *The Case Beyond Time*, 45 BUS. LAW. 2105 (1990); Trevor S. Norwitz, *"The Metaphysics of Time": A Radical Corporate Vision*, 46 BUS. LAW. 377 (1991).

146. *See* Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: Bridging the Unocal/Revlon Gap*, 35 ARIZ. L. REV. 989, 990 (1993) (arguing "that *Unocal* and *Revlon* should be harmonized and that a single standard should govern all takeover defense litigation. In all contexts, the target company's board should have to prove that any defensive action is reasonably related to maximizing shareholder value. In all contexts, the board should be allowed to consider the interests of nonshareholder constituencies but should have to demonstrate that any diminution in shareholder value is not excessive.") Professor Ragazzo's article was remarkably prescient in advocating a change in the law that is very similar to the change we believe the Delaware Supreme Court may actually be adopting in *QVC* (with the possible exception of the treatment of non-shareholder constituencies). *See also*, Note, *Review of Board Actions, Greater Scrutiny for Greater Conflicts of Interest*, 103 HARV. L. REV. 1697 (1990) (criticizing the fragmentation of Delaware standards and advocating a sliding scale of scrutiny based on the degree of conflict of interest).

147. In any event, that drought has been easing. *E.g.*, Anita Raghavan, *Investment Tip for 1994: Follow That Takeover*, WALL ST. J., Dec. 27, 1993 at 15 (noting increased pace of takeover activity in late 1993 and reporting expectations of continued growth in 1994); U.S. NEWS & WORLD REPORT, Jan. 3, 1994, at 100 (total value of merger transactions in 1993 exceeded total value in 1992 by 74%).

First, *QVC* does not really tighten the restrictions on incumbent management in opposing an unwanted offer. It limits itself to situations where management has already agreed to a change in control, and then specifies a standard that is more vague and less certain than the old *Revlon* duty, and leaves incumbent management more room to determine reasonableness. Even if one believes that the Delaware courts are likely to apply this new standard to a much broader range of management actions than those governed by the old *Revlon* duty, incumbent management is left with plenty of power to discourage unwanted takeovers. In short, if the Delaware judiciary were really seeking to encourage more takeover activity and limit managerial opportunities for takeover defenses, the *QVC* and *Technicolor* decisions would not likely be the methods chosen.[148]

Second, *QVC* and *Technicolor* do not represent a change in Delaware law so much as a culmination of a desire, repeatedly stated in the Delaware case law, to unify the legal standard with respect to takeover regulation. Since this goal was expressed as early as 1987 or before, it is hard to see these cases as a response to the takeover drought of the 1990s.

Nor is it likely that Delaware has announced these new legal standards in an effort to provide further protection for incumbent management. Although extensive academic literature exists analyzing the "race to the bottom"[149] and the extent to which Delaware law is necessarily responsive to the needs of corporate managers who, if sufficiently dissatisfied with Delaware might choose to reincorporate elsewhere, it is unlikely that the shift from *Van Gorkom* and *Unocal/Revlon* to *Technicolor* and *QVC* can be explained in those terms.

The new cases and the rule they embody are not particularly protective of incumbent management. Both *Technicolor* and *QVC* find that the defendant boards breached their fiduciary duties under the facts presented. While the end of a separately defined *Revlon* duty may be welcome news to some managers, it is doubtful they would want to replace it, as the *QVC* courts did, with a more loosely defined obligation, subject to enhanced judicial scrutiny, to achieve the transaction offering the best value reasonably available to shareholders. As the events following the court's order in *QVC* illustrate,[150] that looser duty may still lead management to conduct an auction in many cases.

Finally, Delaware's need to avoid massive reincorporation by disgruntled corporate managers, on the one hand, and to recognize its important role

148. The Delaware Supreme Court's decision in *Time-Warner* also should not be understood as expressing a desire to address the wider policy implications of a broad *Revlon* duty to maximize immediate shareholder value. Any concern that opinion evinced about the obligations imposed by *Revlon* are more properly understood as reflecting a desire to unify the doctrine than to redefine its implications on the market for corporate control.

149. *E.g.*, Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987).

150. *See supra* note 17.

in the functioning of the capital markets and American economy, on the other, do place serious constraints on Delaware law and prevent it from tilting too far in either a pro-management or pro-shareholder direction.[151] Delaware corporate law shows a persistent tendency to look for the middle way between rules that empower shareholders at the expense of management and rules that are overtly management protective. Given that predilection, however, the Delaware courts are still free to choose from a variety of doctrinal possibilities that fall within the middle range of the manager-shareholder spectrum. From this perspective, the fragmented analytic framework of the late 1980s, sometimes strongly management protective and sometimes not, was a perfectly fine legal regime which did not require any change.[152] The question remains, therefore, why the Delaware courts have made this sideways move to a similar middle position through a more unified and general fiduciary standard.

INTERNAL JUSTIFICATIONS FOR A UNIFIED STANDARD

Delaware judges are practitioners of Delaware corporate law. Almost every Delaware judge has engaged extensively in counseling, applying and/or litigating matters of Delaware corporate law before going on the bench.[153] Moreover, the job of being a Delaware Chancery or Supreme Court judge necessarily involves the constant analysis, development and application of Delaware corporate law, in a wider variety of settings than faced by most private practitioners of Delaware corporate law.[154] Delaware judges, not surprisingly, could turn out to be uniquely concerned with the internal consistency, coherence, and justifiability of Delaware corporate law. As judges, and particularly as judges in equity, they must also be concerned that the rules they are applying lead to fair and consistent results.

151. *E.g.*, William W. Bratton, *Corporate Law's Race to Nowhere in Particular*, TORONTO L. REV. (1994) (forthcoming book review) (reviewing ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1991)).

152. An even more cynical viewpoint sometimes expressed as the motivation for legal change in Delaware is the need to provide employment for the Delaware bar. Again, this concern might prevent certain dramatic changes in Delaware law, but certainly cannot explain the results of *QVC* and *Technicolor*. It is true that the generality and vagueness of the standards introduced in those cases leave plenty of room for potential litigation, but there was equal doctrinal uncertainty and potential for litigation in the fragmented post-*Revlon* regime, with its fluctuating "zones" and differing standards of conduct all potentially applicable to the same board actions.

153. *See generally*, *Bicentennial of the Delaware Court of Chancery*, 48 BUS. LAW. 351 (1992) (essays by William J. Rehnquist, Chief Justice of the United States; E. Norman Veasey, Chief Justice of Delaware; William T. Allen, Chancellor, Delaware Court of Chancery; Maurice A. Hartnett, III, Vice Chancellor, Delaware Court of Chancery).

154. *Id.*

From this perspective one can understand how the fragmented legal standard of the post-*Revlon* cases would trouble the Delaware judiciary. The cases implied that different factual circumstances yielded different legal obligations. Ultimately though, there was no coherent justification to explain why certain duties attached in certain circumstances but not in others.[155] Consider *Revlon*.[156] It was first applied in a situation where the break up of the company was inevitable. If sale of individual divisions created an obligation to get the highest immediate value for shareholders, however, why didn't the sale of the entire company to a third party invoke a similar duty? If all sales, or all sales of control, invoked such duties, why was the seemingly equivalent decision by management not to sell the company subject to less stringent review? The case law made such distinctions, and practitioners studied them carefully, but lacking any underlying theoretical or policy rationale, the distinctions often appeared arbitrary and ad hoc.

Even worse, because the distinctions also seemed highly formal, they were subject to manipulation by careful corporate planners. If a "sale of control" was what triggered *Revlon*, it was possible to design a transaction that appeared as a merger or combination that was not a sale of control, but which nonetheless substantially changed the economic substance of the shareholders' interest in the combined entity. If, as in *Time-Warner*, a particular transaction was found not to trigger *Revlon* duties, you could be sure that future transactions would be structured to look as much as possible like the Time-Warner deal.

The Delaware courts have a well developed response to the ever present danger that the formal nature of corporate law rules make them easily subject to manipulation. That response is to leave certain parts of Delaware corporate law—particularly those that deal with prophylactic remedies for managerial misconduct—general, vague and uncertain. Accordingly, the move in *QVC* from a specific *Revlon* duty to sell the company for the highest immediate value to a vague general duty to act in good faith and on reasonable information to achieve the best value reasonably available for shareholders is a standard move in Delaware law.[157]

155. Given these craft concerns, one might wonder why the doctrinal fragmentation developed in the first place. One possibility is that it simply grew as a function of the high volume of takeover litigation in the latter 1980s and that the relative lack of such litigation is now enabling the Delaware courts to conduct some doctrinal repair and commentators to recognize it.

156. 506 A.2d 173 (Del. 1986).

157. The standard move is exemplified in the Delaware Supreme Court opinions, which so often begin their analysis with the pointed reminder that, under § 141(a) of the Delaware General Corporation Law, the board of directors is charged with managing the business and affairs of the corporation and that their actions are generally protected by the business judgment rule. *E.g.*, Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 41-42 (Del. 1994).

Somewhat more unusual is the court's insistence that distinctions made in prior case law are not legally significant, that *Unocal*, *Revlon*, *Van Gorkom* and *Macmillan* are all expressions of the same fundamental legal standards. Notice how the assertion of such a unified standard solves the problems of inequity between cases, manipulability of cases and lack of coherence. There is no unfairness in subjecting some directors to *Revlon* duties but not others in similar situations, if the *Revlon* duty itself has no special legal significance. Corporate auctions become merely a means some boards choose to fulfill the same general obligation every other Delaware board has, rather than a special obligation imposed haphazardly on some managements without a coherent justification.

The dangers of potential manipulation of corporate law are also ameliorated, because every deal, no matter the structure, is subject to the same general fiduciary analysis. As for coherence, the Delaware Supreme Court in *QVC* held that all sales of control are governed by the same doctrinal standard.[158] As argued previously, that same legal standard may well be extended to all board decisions that significantly alter or affect shareholder interests.

IMPLICATIONS OF THE UNIFIED STANDARD

The move to a unified standard is neither good news nor bad news for corporate boards, although it will certainly change the way their duties are perceived and analyzed, as well as the way their meetings are conducted. It is not bad news because it removes from directors the straitjacket of short term profit maximization many saw embodied in *Revlon*. After *QVC*, little doubt exists that directors in takeover situations retain important aspects of the broad discretion always reposed in directors under Delaware law. The unified standard is not necessarily good news for them, however, because *QVC* also requires directors, in exercising their discretion, to show that whatever course of action they choose is reasonable in light of the information available. This sideways move therefore raises a number of important practical issues.

THRESHOLD ISSUES

In litigation terms, directors defending ordinary business decisions enjoy the immediate protection of the business judgment rule. For decisions where enhanced scrutiny applies, directors first must demonstrate an adequate informational basis justifying their decisions. If satisfied, then the business judgment rule applies. If not satisfied, then their decision was reached in violation of their fiduciary duty, with one of two consequences. When injunctive relief is sought, as in *QVC*, the injunction must be granted once a breach of duty is found; when damages are sought, as in *Technicolor*,

158. *Id.* at 46.

a finding of breach of fiduciary duty shifts the standard of review from the business judgment rule to the instrinsic fairness standard.[159]

TRIGGERS

The *QVC* decisions do not hold that only sales of control trigger enhanced scrutiny review and, as this Article argues, Delaware courts may well apply this same standard to defensive tactics and other extraordinary transactions. Accordingly, the broadest possible trigger for the unified standard would be whether the challenged board decision significantly altered or affected the shareholders' interests.

This distinction between ordinary and extraordinary decisions and the additional burden on directors in extraordinary cases reflects the fundamental principle of Delaware corporate law that directors do not have a generalized duty to be fully informed concerning the ordinary, day-to-day business and operations of the corporation.[160] Directors do have a generalized duty to become fully informed with respect to transactions that significantly alter or affect shareholders' rights.[161] Accordingly, enhanced scrutiny review could be triggered by all decisions that involve any fundamental change in the "nature of the corporate enterprise from a practical standpoint."[162] Certainly it applies to all sales of control, but may be applied as well to decisions adopting measures that are or may be defensive,[163] as well as other decisions involving extraordinary corporate transactions.[164]

159. *See infra*, Appendix. There is some tension between the Delaware Supreme Court's statement in *QVC* that director decisions "[w]here actual self interest is present" are subject to the "even more exacting judicial scrutiny" of the intrinsic fairness test, *id.*, at 42 n.9, and the ruling in *Technicolor* that a breach of due care, even absent self-dealing, also yields intrinsic fairness review. It may be that the court in *QVC* was not being exhaustive, but simply trying to distinguish those cases where self-dealing or lack of due care can be shown by plaintiff (in which case intrinsic fairness is applied) from those where plaintiff's showing is only sufficient to yield enhanced scrutiny review.

160. *See* Graham v. Allis-Chalmers, 188 A.2d 125 (Del. 1963).

161. Of course, whether ordinary course or otherwise, "all decisions of a properly-functioning board must be informed," *QVC*, 637 A.2d at 43 n.13, but the degree of information required of the board may vary from case to case. *Id.*

162. *Id.* at 47-48.

163. These include all such mechanisms conventionally understood as subject to "*Unocal* duties."

164. These include conventional responsive actions such as crown jewel sales, split ups, spin offs, self-tenders, white knight and white squire transactions and stock sales to ESOPs, as well as those and related transactions not used defensively, such as reclassifications, recapitalizations, liquidations, sales of all or substantially all the assets, and mergers, without regard to their form.

Potentially more difficult to characterize as ordinary or extraordinary are decisions concerning matters such as executive compensation and charitable contributions. Traditionally, such decisions have been accorded the protection of the business judgment rule, subject only to an exception upon plaintiff's showing that the action constitutes waste. *E.g.*, Theodora

CHOOSING AMONG STRATEGIES

If a single unified standard is applied both to board decisions to sell the company and to remain independent, Delaware doctrinal law will not favor a decision to "just say no," but will require directors who reject an offer to have a reasonable informational basis for concluding that the offer does not provide the best value reasonably available for the shareholders.[165] Similarly, with respect to a decision to enter into a negotiated transaction in the absence of any third-party bid (as in *Technicolor*), the board must demonstrate a reasonable basis for concluding that the contemplated transaction would yield the best value reasonably available for shareholders. Given the numerous factors *QVC* expressly makes applicable to all such determinations,[166] however, making such a showing should not be a problem for all but the most poorly advised or unreasonably obstreperous boards.

SATISFYING THE OBLIGATION TO BE FULLY INFORMED

The unified standard implies that directors must be able to establish a reasonable basis of information to support its decisions. To that end, the board's advisors must gather and analyze all relevant information relating to a decision and present its material conclusions to the board in a format and under timing and other conditions that will enable the directors to reach a reasonable and fully informed decision.[167]

The circumstances will dictate what information is relevant for advisors to gather and digest, what constitutes material information the board must read, hear and understand, how much time is necessary, and so on, in each case based on what is reasonably required so that directors can render an informed business judgment with respect to that particular action.[168] At one extreme for example, adopting a staggered board provision or poison pill independent of any threat would not require much more than an understanding of its purpose and beneficial and harmful conse-

Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969). For a prescriptive argument that this standard should be made more stringent, *see* Charles M. Yablon, *Overcompensating: The Corporate Lawyer and Executive Pay*, 92 COLUM. L. REV. 1867 (1992).

165. *See QVC*, 637 A.2d at 43 n.13 ("where a potential sale of control by a corporation is not the consequence of a board's action this court has recognized the prerogative of a board of director to resist a third-party's unsolicited acquisition proposal or offer" provided the decision is "informed").

166. *See supra* text accompanying notes 95-96.

167. Directors are fully protected in relying in good faith upon such advisors but only "as to matters the [director] reasonably believes are within [the advisor's] professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation." DEL. CODE ANN. tit. 8, § 141(e) (1990).

168. *QVC*, 637 A.2d at 43 n.13.

quences.[169] At the other extreme, an unwavering commitment to a particular transaction that forecloses considering alternative transactions, for example through aggressive lock-up protection, almost always will constitute a failure to be fully informed.[170] In each case, the board's receptivity to obtaining and studying all material information relevant to its decision is critical.[171]

That critical question cannot be addressed in a formulaic way. Indeed, perhaps the most important practical implication of the unified standard revealed in *Technicolor* and *QVC* is that there can be no prescribed set of information to be studied or procedures to be followed that will assure discharge of a board's fiduciary obligations.[172] It seems, for example, that it will not always be enough to rely on the opinion of an investment banker, although in many circumstances it will be helpful. Both as a matter of becoming fully informed in fact and in demonstrating this to a court, it will be important to have developed and studied (either internally or with the help of outside financial consultants) quantitative information concerning alternative transactions,[173] assuming that such quantitative information can be shown to support the superiority of the favored course of action.

CONSIDERATION OF OTHER CONSTITUENCIES

Delaware law has always recognized that the board's primary obligation is to protect and advance the interests of the corporation's shareholders. This shareholder primacy is strongly reaffirmed in *QVC*. One of the hotly contested issues in defining the shareholders' interest, however, has been whether it should be defined on a long term basis or a short term basis. It often has been claimed that the shareholders' long-run interests may be advanced by protecting in the short-run the interests of nonshareholder

169. Accordingly, that enhanced scrutiny applies to the broad range of extraordinary board decisions should not be understood as threatening to increase litigation challenging decisions such as adopting a staggered board or a poison pill because although enhanced scrutiny applies to such decisions, in many cases it will not be difficult to satisfy.

170. For a useful summary of alternative mechanisms and their viability, see Meredith M. Brown & Gary Kubek, The Paramount Duties of Directors, INSIGHTS, Mar. 1994, at nn.25-27.

171. In the case of a transaction resulting in a majority or controlling shareholder, consideration would also have to be given to what protection the non-controlling or minority shareholders have against the controlling shareholder's power to effect freeze-outs and other transactions altering shareholder rights.

172. This is not to say that articles like Martin Lipton, *Takeover Bids in the Target Boardroom*, 35 BUS. LAW. 101, 121-24 (1979), which detail a series of issues to be considered and information to be reviewed in order to form a reasonable and informed business judgment concerning a takeover bid, cannot be helpful. For further advice along similar lines in light of *QVC*, see Martin Lipton & Theodore N. Mirvis, *Ten Questions and Answers Raised by Delaware's Paramount Decision*, N.Y.L.J., Feb. 10, 1994, at 1 (questions 3, 4 & 6).

173. Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994).

constituencies, such as employees, suppliers and the communities in which the corporation operates. While boards subject to the old *Unocal* duties were permitted to consider such interests so long as it was reasonable to do so, boards subject to the old *Revlon* duties could not because they were required to maximize immediate (short-term) shareholder value.

In rejecting *Revlon* duties, the unified standard also rejects the proposition that directors must ever act only in the short-run or according to any other particular time horizon.[174] Rather, under the unified standard, boards have broad discretion in defining the shareholders' interest, including the particular time horizon over which it is measured.[175] As with other board decisions, so long as the directors act on a fully-informed basis and in a reasonable manner, judicial scrutiny will not upset the exercise of that business judgment.

Interests of other constituencies, however, remain subordinated to the primary interests of the shareholders. Accordingly, boards who choose to consider the interests of other constituencies also will have to consider (and be able to demonstrate) how addressing those interests advance the shareholders' interest as well.[176]

INDEPENDENT COMMITTEES AS A POSSIBLE "SAFE HARBOR"

The unified standard leaves intact the *Weinberger* requirement of an independent committee of the board to negotiate in freeze-out mergers and in any context involving direct pecuniary interest of directors. In cases

174. The *QVC* opinion made no reference to any immediate time frame, and emphasized that the board's obligation is to "realize for the stockholders the best value reasonably available." *Id.* at 43-51. It stated that the best value may be determined in any way that is reasonable and fully informed, however, and may include the future value of a strategic alliance, *id.* at 44, and the value of non-cash consideration whose value may be realized by shareholders at some future point in time. *Id.* at n.14.

175. Ardent devotees of the efficient capital market hypothesis deny the existence of any difference between short term and long term values on the grounds that current market prices represent the discounted present value of a company's long term value. *E.g.*, Jonathan R. Macey, *State Anti-Takeover Legislation and the National Economy*, WIS. L. REV. 467, 481 (1988). That claim is tenuous given substantial evidence that the efficient capital market hypothesis is not an accurate account of public capital market behavior. *See* Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 GEO. WASH. L. REV. 546 (1994).

176. Consider for example two offers differing in value by five percent, with the lower bidder promising to continue existing employees and the higher bidder promising to fire half the work force. The board could consider whether the lower raw bid offered a superior transaction for shareholders on the grounds that the employee protection would ultimately benefit them. Before concluding that the lower raw offer is superior, however, the board would have to be able to demonstrate reasonable grounds for that conclusion. As in making any decision, this would require preparation and consideration of specific financial data concerning the projected consequences of the alternative transactions, using a reasonable set of alternative assumptions and scenarios.

of structural bias and takeover defense strategies, and indeed in any extraordinary context, the unified standard implies that it will always be helpful to appoint a special committee with bargaining authority, as the Delaware cases have repeatedly pointed out.[177] Such a committee could then determine what information was necessary to evaluate a particular decision and then design a plan to obtain and study that information.

DIRECTORS' EXPOSURE TO PERSONAL LIABILITY

Delaware's due care opt-out statute, section 102(b)(7), permits charter amendments limiting the personal liability of directors for breaches of fiduciary duty other than the duty of loyalty.[178] Under the unified standard the duty of care and the duty of loyalty are less sharply delineated. Breaches of the fundamental obligation may reasonably be characterized as involving either. This raises the stakes against directors because when making their decisions they will not be sure whether any shortcomings in their information gathering or deliberative processes will constitute a breach of the duty of care or loyalty or both.[179]

While the unified standard does not address any of these questions directly, its emergence makes some predictions possible. Section 102(b)(7) was a response to the Delaware Supreme Court's imposition of due care liability in *Van Gorkom*, which the Delaware legislature was convinced threatened exposing management to undue civil liability. The unified standard draws expressly on the duty to be reasonably informed set forth in *Van Gorkom*, and *Technicolor* and *QVC* both tend to characterize the director's duty in takeover situations as reflecting a general duty of care. Nonetheless, strong duty of loyalty elements are present in all these cases, and *Technicolor* and *QVC* both blur the distinction between duty of care and duty of loyalty. Accordingly, we suspect that while section 102(b)(7) will continue to protect the ordinarily careless director, egregious breaches of the duties imposed by these cases will tend to be characterized as duty of loyalty claims and expose directors to personal liability for breaches of fiduciary duty.

CONCLUSION

In the oral argument before the Delaware Supreme Court in *QVC*, after Justice Moore admonished counsel that the Court does not use terms like

177. *E.g.*, Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1343 (Del. 1987) ("with the independent directors in the majority, proof that the board acted in good faith and upon reasonable investigation is materially enhanced") (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985), and numerous other Delaware cases).

178. DEL. CODE ANN. tit. 8 § 102(b)(7) (1990).

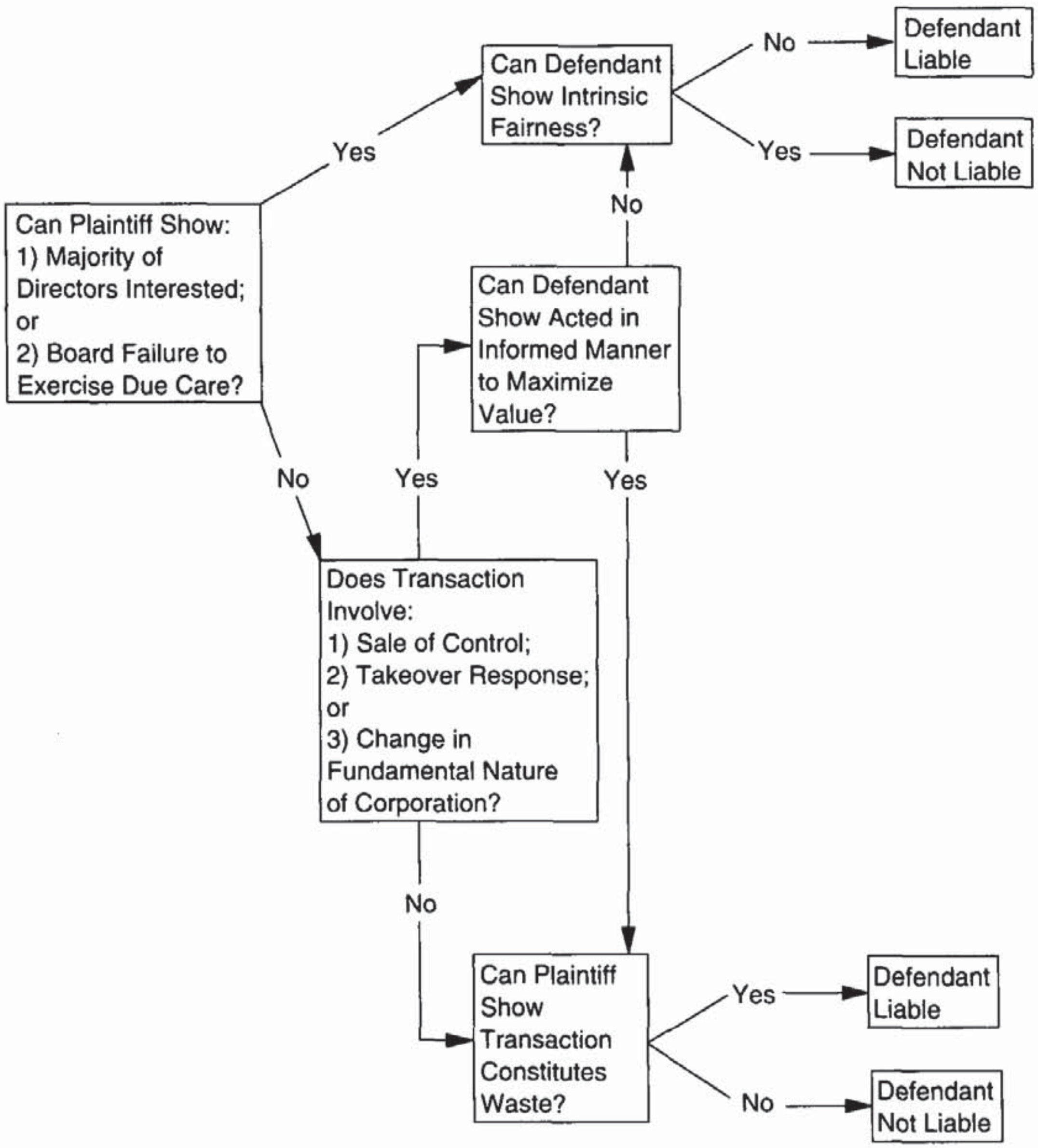
179. In any case, though, the statute may have a limited impact on violations regarded as due care breaches because, at least in terms, it does not limit nonmonetary remedies such as injunctive relief and also does not address the relevance of insurance or indemnification.

"*Revlon*-land," in a stage whisper he quipped further that "at least that is what I tell my students."[180] Trying to discern the future path of Delaware corporate law from such judicial banter is undoubtedly folly, but predicting developments in Delaware law has always been a somewhat foolish enterprise. Many learned commentators have written careful and lucid analyses predicting the trend of Delaware case law, only to have doctrinal prognostications shattered by the next big case. Predicting the course of Delaware law from prior case law is like watching clouds. They seem, at times, to take on recognizable shapes and forms, even to resemble something familiar. But you know that whatever shapes you think you see can vanish in a puff of wind.

Nonetheless, the issues Delaware courts deal with are so important, and are relied on by so many in structuring and thinking about economic activity, that it would be folly not to try to make the best predictions possible about the future path of Delaware corporate law. Accordingly, we recognize that our analysis and prognostications about Delaware law following *Technicolor* and *QVC* could easily turn out to be wrong. Yet little doubt exists that the goal of unifying fiduciary duty law on the basis of a few clear and readily understandable principles remains a strong theme and motivation in Delaware law. The Delaware courts will continue to strive for consistency and coherence, even while knowing such goals can never be fully achieved. This Article has suggested that the *Technicolor* and *QVC* decisions may be understood as steps in that direction.

180. Videotape of Oral Argument, December 9, 1993 (on file at the Cardozo Law School Library).

Unified Standard "Decision Tree"[1]



[1]These graphical depictions of the "structure" of Delaware fiduciary duty law are of course simple pedagogical illustrations of the significant difference between the law as it came to exist by the late 1980s and the law as it seems to exist after *Technicolor* and *QVC*. The "boxes" depicted and the results they are shown to imply do not have the "boundaries" assigned to them, but rather constitute "fuzzy sets with fuzzy boundaries." *See* Charles M. Yablon, *On the Allocation of Burdens of Proof in Corporate Law: An Essay on Fairness and Fuzzy Sets*, 13 Cardozo L. Rev. 497 (1991).

Fragmented Standard "Decision Tree"